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No. 91-726

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

THELMA WEASENFORTH LUNAAS, Individually And
On Behalf Of All Those Similarly Situated,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Does Article VI(1)¹ of the Constitution of the United States give rise to a right of action to recover Revolutionary War loans?

2. Is the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) unconstitutional as applied to claims founded upon Article VI(1) of the Constitution of the United States, having regard to the fact that, if such statute applies, enforcement of *no* such claim could have been demanded after (at the latest) March 3, 1893?

3. May Congress, by means of a statute of limitations, foreclose, forever and as to *all* possible claimants, payment of obligations imposed by Article VI(1) of the Constitution of the United States, which, by preserving and giving effect to Article XII of the Articles of Confederation, continues to solemnly pledge and mandate payment of such obligations without limitation of time?

4. May the non-constitutional doctrine of sovereign immunity be used to defeat a constitutional provision?

5. Has the unfulfilled constitutional provision of Article VI(1) of the Constitution of the United States become time-barred?

¹ For brevity, Petitioner will refer to U.S. CONST. art. VI, cl. 1, as "Article VI(1)". Like designations are used for the other two clauses of that Article.

QUESTIONS PRESENTED - Continued

6. Does the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) bar the recovery of interest accruing on a loan during the six years immediately preceding the filing of Petitioner's complaint?

7. Does the statute of limitations applicable to the United States Claims Court (28 U.S.C. 2501) bar the recovery of a loan, the terms of which were modified, by proper Congressional enactment, to postpone the time for repayment and permit interest to accrue indefinitely?

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PETITIONER'S REPLY BRIEF

OPINIONS BELOW

The unreported decision of the United States Claims Court is set forth in Petitioner's Appendix. Pet. App. A10. The Court's reasons for that decision, announced orally and reflected in a transcript of the proceeding, are set forth in Petitioner's Appendix. Pet. App. A11-A19.

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 936 F.2d 1277 (Fed.Cir.

1991) and is set forth in Petitioner's Appendix. Pet. App. A2-A9.

BASIS OF THE COURT'S JURISDICTION

The United States Court of Appeals for the Federal Circuit entered its decision in this case on June 25, 1991. Pet. App. A1. That Court denied a timely petition for rehearing with suggestion for rehearing *en banc* on July 31, 1991. Pet. App. A20-A21.

The petition for a writ of certiorari was filed on October 29, 1991. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The statement of the case is as set forth in Petitioner's petition for a writ of certiorari. Pet. 5-9.

ARGUMENT

The government, in its Brief for the United States in Opposition, attempted to reach its desired result by: (1) ignoring critical facts of the case, (2) over-simplifying the issues, (3) wholly failing to address any of the constitutional issues of first impression raised by Petitioner, (4) citing case law having little, if any, relevance to the facts of this case, and (5) ignoring the mandates of landmark decisions of this Court. For the reasons which follow, the

government's brief fails to address the true issues before this Court.

I. This Case Raises Constitutional Issues of First Impression

Because this is a case of first impression, it obviously is not in direct conflict with any decision of this Court or any other court of appeals. However, if the decision of the Court of Appeals is permitted to stand, an exception will have been created to the fundamental rule established by *Marbury v. Madison*, 5 U.S. 137 (1803). Hereafter, the Constitution of the United States will not be the supreme law of the land if Congress feels it has a good reason for departing from it. Article VI(1) itself will cease to have effect. The potential ramifications of such an exception and result are unacceptable. For that reason, further review *is* warranted.

The government contends that this is just another case in which a constitutionally-based claim can be time-barred. The government entirely overlooks the fact that Article VI(1) of the Constitution is fundamentally different from any other provision inasmuch as it imposes on the United States a positive obligation that is not limited by time. This matter has been addressed in the petition for writ of certiorari. Pet. 12-19. Furthermore, because Article VI(1) has never before been judicially interpreted, not only does the present case not conflict with prior decisions of this Court, but it also presents a case of first impression regarding the true interpretation of that Article, and, in fact, of its shelf life.

The government contends that this case turns on a straightforward application of 28 U.S.C. 2501. U.S. 3. As demonstrated by Petitioner's statement of questions presented, the real issues are far more complex.

There are no cases in which the true construction of Article VI(1) of the Constitution has been considered. If the government is correct in contending that Petitioner's claim has been time-barred for 123 years and that the Court must follow authority such as *Block v. North Dakota*, 461 U.S. 273 (1983), then the result is that *no* Article VI(1) claim can be enforced. No statute or case law has ever effected such a result. Article V to the Constitution precludes such a result. The question here, which has never before been answered, is whether the Constitution of the United States will permit such a result to ensue.

Also due to the unique characteristics of Article VI(1), other general propositions are inapplicable. *See, e.g., Soriano v. United States*, 352 U.S. 270, 276 (1957) (Section 2501 "must be strictly observed and exceptions thereto are not to be implied"); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued"). Article VI(1) expressly states that these debts "shall be valid *against* the United States". This Court, as ultimate arbiter of the Constitution, must ensure that the Constitution is upheld in those instances where, as here, Congress refuses to act and attempts to prohibit any other body from acting.

Contrary to the contention of the government (U.S. 5), Petitioner did cite authority suggesting that Article

VI(1) was intended to prohibit the *Congress* from “adopting an orderly mechanism for the disposition of the claims for debt assumed from the Confederation under Article VI(1).” *See*, Pet. A12-A15. Evidence of our Framers’ intent, which can be gleaned from the debates surrounding the adoption of Article VI(1) and the further debates and reports of our first Congress, will be fully briefed upon this Court’s decision to hear the case.

Petitioner does not contend that the Framers silently forfeited the authority of the *United States* to adopt a reasonable limitations period for the claims transferred by Article VI(1). U.S. 6. Through the amendatory process authorized by Article V of the Constitution, the people of this country can put an end to the solemn pledge of Article VI(1). But they have not done so. And the Congress cannot do so by statute.

II. Omitted Facts Affect the Entire Posture of the Case

Petitioner alleged that Jacob De Haven, her ancestor and a lender of funds to the government during the Revolutionary War, was given the option to continue his money *indefinitely* at interest. Pet. 6. Contrary to the government’s contention, Petitioner even cited authority for that allegation. Pet. App. A42². Petitioner never asserted

² Alexander Hamilton was, at the material times, Secretary of the Treasury of the United States, the Respondent herein. Accordingly, his statements relevant to this case have evidentiary value as admissions by a party opponent. *See*, *Federal Rules of Evidence*, Rule 801(d)(2)(C) and (D).

that recovery of the principal might be time-barred under the continuing claims doctrine and, consequently, this case is more akin to *Amy v. Dubuque*, 98 U.S. 470 (1878) and *Clark v. Iowa City*, 87 U.S. 583 (1874). This issue will likewise be fully briefed upon this Court's decision to hear the case.

In its brief, the government initially neglected to mention the continued accrual of interest (U.S. 2) and then subsequently tried again to use general principles plus an erroneous set of facts to conclude that continued accrual of interest was not possible and that Petitioner's claim must thus fail. U.S. 6-7. The government further failed to cite any authority demonstrating that the right to the principal and/or indefinite accrual of interest had been terminated.

Because the case was disposed of on a motion to dismiss for lack of jurisdiction and, consequently, all facts must be viewed in the light most favorable to the Petitioner, this Court must assume to be true Petitioner's allegation that Jacob De Haven's loan continues to accrue interest. This is particularly so inasmuch as the government has offered no evidence to the contrary and precluded Petitioner from discovery on such issues by successfully filing a motion to suspend discovery.

The mere fact that Jacob De Haven and his heirs made various demands for repayment, without evidence regarding the government's response to said demands, cannot affect that result. For all we know, the government told Mr. De Haven and his descendants, "sorry, we cannot pay now - come back later". The government may have said something to the effect of "we will check into

the matter". Accordingly, without development of the facts, the government's "accrual of the claim" arguments are irrelevant, at the very least, to the issues now before this court.

Even assuming 28 U.S.C. 2501 can be constitutionally applied to Petitioner's claim, Petitioner is in no way barred from seeking judicial redress for recovery of the principal and the interest which accrued during the six years preceding the filing of this action.

III. The Purposes of Statutes of Limitations are Not Satisfied by the Straightforward Application of 28 U.S.C. 2501 and Its Predecessors to Article VI(1) Claims

Although the government contends that the earliest opportunity for judicial redress of this claim arose in 1863, Petitioner's ancestors actually had a limited remedy in 1855 when the United States Court of Claims was first established. However, even by 1855, witnesses were already dead and faded memories were thus irrelevant, and documents were already destroyed due to repeated burnings of the Treasury department and other governmental buildings.

Strangely enough, a proper examination into the merits of Petitioner's claim can be more easily undertaken now than at any other time since 1855. Prior to the establishment of the National Archives, government documents were warehoused in a multitude of various buildings and unavailable for public inspection. Now, many documents relevant to Petitioner's claim are orderly

housed and available in the National Archives. And presumably, the government continues to find ways to improve the dissemination of the information contained in them.

Pursuit of Petitioner's claim can be more easily undertaken now than at any other time since 1855. Prior to the adoption of the Federal Rules of Civil Procedure, full discovery of all relevant government documents was difficult, if not impossible. By the time even limited judicial redress was accorded Petitioner's ancestors in 1855, the numerous family members resided in various places across the continent and summoning them all together for the purpose of pursuing this claim would have been an arduous task. The advent of the class action provisions of the Federal Rules and improvement in communication facilities rendered suit more feasible.

The only purpose advanced by application of 28 U.S.C. 2501 and its predecessors to Article VI(1) claims is that no Article VI(1) claim can ever be enforced. Again, can this be done?

◆

CONCLUSION

The government's reliance upon a simple application of 28 U.S.C. 2501 is misplaced. This case asks, *inter alia*, "Can Congress legislatively prevent all enforcement of an entire constitutional provision?" The Court of Appeals has answered that question in the affirmative and thereby opened the door to future derogations from the Constitution by the Legislature. Petitioner begs this Court to grant

the petition for writ of certiorari and reverse the damage thus done.

Respectfully submitted,

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